

Sexual Harassment Prevention Training

Presented by:

The California Department of Fair Employment
and Housing & CalHR

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INTRODUCTION

Presenters

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Learning Objectives

This program meets the requirements of Government Code §12950.1. We will:

1. Review the elements of sexual harassment and the remedies available to victims of sexual harassment under both California and federal laws.
2. Discuss other forms of unlawful harassment.
3. Consider strategies for preventing and responding to unlawful harassment.
4. Address concerns regarding abusive conduct in the workplace.

OVERVIEW OF LAWS AGAINST SEXUAL HARASSMENT

True False Quiz #1

1. Individuals can be personally liable for sexual harassment. True/False
2. Volunteers and unpaid Interns are not protected against sexual harassment. True/False

Answer to T/F Quiz #1

1. Individuals can be personally liable for sexual harassment. True/False
2. Volunteers and unpaid Interns are not protected against sexual harassment. True/False

Who is Protected by the Law?

- Employees
- Applicants
- Contractors
- Volunteers
- Unpaid Interns

Who is Liable Under the Law?

- Every employer or prospective employer.
- Every person in the workplace: supervisor, subordinate, co-worker found liable for sexual harassment is personally liable for the damages caused by the unlawful harassment.

Personal Liability of Harasser

The individual harasser is personally liable for the damages caused by his or her unlawful actions.

Liability of Employer

An employer is strictly liable for the unlawful harassment by its supervisors and agents.

“Supervisor” Explained

A person qualifies as a supervisor for purposes of the FEHA if he or she had the discretion and authority (a) to hire, transfer, promote, assign, reward, discipline, or discharge other employees, or effectively recommend any of these actions; (b) to act on the grievances of other employees or to effectively recommend action on grievances; or (c) to direct the claimant’s daily work activities.

Harassment by non-supervisory employees

Employers can be liable for harassment by non-supervisory employees if the employer knew or should have known about the harassing behavior and failed to take immediate and effective corrective action.

Two Forms of Sexual Harassment

Sexual harassment is defined by case law in two ways:

1. Quid Pro Quo

- A. Demanding sexual favors in exchange for employment benefits
- B. Demanding sexual favors by threatening negative employment actions; OR

2. Hostile Work Environment

- A. Harassing behavior directed toward the complainant
- B. Harassing behavior witnessed by the complainant
- C. Widespread sexual favoritism that infects the workplace creating a hostile or abusive environment.

Remedies

- Injunctive Relief
 - Training
 - Development or changes in policies/procedures
- Economic Damages
 - Lost wages
 - Medical expenses
 - Job search expenses
- Non-Economic Damages
 - Emotional Distress
 - Loss of Enjoyment of Life
- Punitive Damages

CLOSER ANALYSIS: QUID PRO QUO

True False Quiz #2

1. The promise of reward or threat of punishment in exchange for sexual favors must be explicit in order to constitute quid pro quo sexual harassment. True/False
2. An employee who gives in to the demand for sex in order to avoid negative consequences forfeits his or her claim for quid pro quo sexual harassment. True/False
3. If the alleged harasser denies the charge, a claim for sexual harassment cannot be successful without a neutral witness or documentary evidence supporting the complainant's accusations. True/False

Answer to T/F Quiz #2

1. The promise of reward or threat of punishment in exchange for sexual favors must be explicit in order to constitute quid pro quo sexual harassment. True/False
2. An employee who gives in to the demand for sex in order to avoid negative consequences forfeits his or her claim for quid pro quo sexual harassment. True/False
3. If the alleged harasser denies the charge, a claim for sexual harassment cannot be successful without a neutral witness or documentary evidence supporting the complainant's accusations. True/False

Quid Pro Quo Explained

- The essence of a quid pro quo sexual harassment claim is that a supervisor relies on his or her apparent or actual authority to extort sexual favors from an employee.
- The threat may be express or implied.

Exercise 1

Blake, the sole proprietor of Acme Co., has decided to expand and compete for state contracts. He hires Jack, an independent contractor, to install a computer network. Jill responds to Blake's Craigslist ad for an office manager.

Blake threatens to sue Jack for breach of contract unless Jack agrees to have sex with him.

Blake tells Jill the job is hers if she agrees to have sex with him.

Exercise 1 Test

Choose the best answer:

- A. Jack can't sue Blake because he is an independent contractor.
- B. Jill can't sue Blake because Acme Co. has fewer than five employees.
- C. Jack can't sue Blake because he is a man.
- D. Jack and Jill can sue Blake for quid pro quo sexual harassment.
- E. Jack can sue Blake for quid pro quo sexual harassment but Jill cannot.

Exercise 1: Best Answer

- A. Jack can't sue Blake because he is an independent contractor.
- B. Jill can't sue Blake because Acme Co. has fewer than five employees.
- C. Jack can't sue Blake because he is a man.
- D. Jack and Jill can sue Blake for quid pro quo sexual harassment.
- E. Jack can sue Blake for quid pro quo sexual harassment but Jill cannot.

Exercise 2

Sara is the Department's Deputy Director. She approaches Nancy, an OT and says, "Hi Nancy. I've seen you at the gym. You seem to have a great time in Zumba! And so sexy! Nancy, I'd love to take you to Tahoe this weekend. Just the two of us." Nancy is stunned and intimidated by the attention. She says, "Well Nancy, I'm flattered, but I'm not interested." Sara smiles wanly and says, "Well, I had to ask. You are just so sexy. But I get it. I'll leave you alone." Sara does not proposition or engage in any unwelcome conduct toward Nancy again. Three months later Nancy is late to work for three days and her supervisor threatens to deny her MSA if she is late again.

Exercise 2 Test

Choose the best answer:

- A. Nancy can establish a claim for quid pro quo sexual harassment because Sara should never have asked a subordinate on a date.
- B. Nancy cannot establish a claim for quid pro quo sexual harassment because there is no evidence that she is a lesbian.
- C. Nancy's claim for quid pro quo sexual harassment is weak because there is no evidence that Sara was offering job benefits if Nancy said yes, or threatening punishment if Nancy said no.

Best Answer: Exercise 2

- A. Nancy can establish a claim for quid pro quo sexual harassment because a supervisor should never ask a subordinate on a date.
- B. Nancy cannot establish a claim for quid pro quo sexual harassment because there is no evidence that she is a lesbian.
- C. Nancy's claim for quid pro quo sexual harassment is weak because there is no evidence that Sara was offering job benefits if Nancy said yes, or threatening punishment if Nancy said no.

Closer Analysis: Hostile Work Environment

True False Quiz #3

1. To prove hostile work environment sexual harassment the complaining party does not need to show that he/she suffered an adverse employment action.
True/False
2. To prove hostile work environment sexual harassment the complaining party must show that he/she was subjected to unwanted sexual attention that was both severe and pervasive. True/False

Answer to T/F Quiz #3

1. To prove hostile work environment sexual harassment the complaining party does not need to show that he/she suffered an adverse employment action.
True/False
2. To prove hostile work environment sexual harassment the complaining party must show that he/she was subjected to unwanted sexual attention that was both severe and pervasive. True/False

Three Varieties of Hostile Work Environment Sexual Harassment

The courts have recognized three varieties of hostile work environment sexual harassment:

1. Hostile Work Environment -- Conduct Directed at Claimant.
2. Hostile Work Environment – Conduct Directed at Others.
3. Hostile Work Environment – Widespread Sexual Favoritism.

“Harassing Conduct” Explained

Harassing conduct includes unwanted sexual advances that can be:

- Verbal
- Visual
- Physical

Hostile Work Environment: Verbal

- Foul or obscene language
- Derogatory comments
- Explicit discussions about sexual activities
- Comments about other people's physical attributes



Hostile Work Environment: Visual

- Leering
- Staring
- Making sexual gestures
- Displaying sexually explicit objects, pictures, cartoons, graffiti, or posters
- Sending graphic email, text messages, or jokes

Hostile Work Environment: Physical

- Kissing
- Hugging
- Grabbing
- Impeding or blocking movement
- Assault



Exercise 3

Tamika starts as a supervisor for the Commission in Yuba County. The other four supervisors and all the field crews at the Yuba County office are men. Eve, the District Administrator does not think women should be field supervisors and resents that headquarters is “forcing an affirmative action case” on her office.

Eve tells the other supervisors and crew members, “the field is no place for a woman.” She tells Tamika’s crew to, “keep an eye on her,” and “use your own judgment in the field.” During office meetings, around the office, and in emails, Eve consistently refers to Tamika as “little one,” “Wonder Girl,” “Oprah Jr.,” and similar names.

Tamika tells Eve she is undermining her but Eve tells her to “grow a pair or you’ll never make it out there.”

Exercise 3 Test

Choose the best answer:

- A. Eve's use of diminutive nicknames and undermining of Tamika's authority is ok because Tamika needs to demonstrate the ability to supervise men in what can be an inherently crude environment.
- B. Eve's nicknames and statements undermining Tamika's authority have created a hostile work environment.
- C. Because Eve has no interest in Tamika sexually, her hostile behavior is not actionable as sexual harassment.

Exercise 3: Best Answer

Choose the best answer:

- A. Eve's use of diminutive nicknames and undermining of Tamika's authority is ok because Tamika needs to demonstrate the ability to supervise men in what can be an inherently crude environment.
- B. Eve's nicknames and statements undermining Tamika's authority have created a hostile work environment.
- C. Because Eve has no interest in Tamika sexually, her hostile behavior is not actionable as sexual harassment.

Exercise 4

Warren, a member of Tamika's crew frequently refuses to follow her orders, saying, "your boss told me to use my own judgment." Warren and Ben routinely interrupt team meetings by burping, talking and laughing. They insincerely offer "apologies to your ladyship."

Frank tells Warren and Ben, "leave my gal alone." Frank repeatedly comments on Tamika's appearance saying things like, "you are the hottest boss I've ever had; "and "Dollface, you can tell me what to do whenever and wherever you want." He repeatedly asks her out even though Tamika makes clear she is happily married.

Tamika is afraid to call Eve on her behavior, but complains about the treatment by her crew. Eve takes her written complaint but takes no action.

Exercise 4 Test

Choose the best answer:

- A. Frank cannot be found liable for hostile work environment sexual harassment because he is defending Tamika.
- B. Warren and Ben are not liable for sexual harassment because there is no evidence that their disruptive actions substantially motivated by Tamika's sex. Besides, their actions are neither severe nor pervasive.
- C. The Commission is liable for the sexual harassment of Warren, Ben and Frank because management knew or should have known of their behavior.

Exercise 4: Best Answer

- A. Frank cannot be found liable for hostile work environment sexual harassment because he is defending Tamika.
- B. Warren and Ben are not liable for sexual harassment because there is no evidence that their disruptive actions substantially motivated by Tamika's sex. Besides, their actions are neither severe nor pervasive.
- C. The Commission is liable for the sexual harassment of Warren, Ben and Frank because management knew or should have known of their behavior.

“Severe or Pervasive” Explained

To be actionable, the unwanted behavior must be “severe or pervasive” and alter the conditions of employment to the extent that it creates a hostile or abusive work environment.

Considerations

- The nature of the conduct.
- The frequency of the conduct
- The period of time over which it occurred.
- Whether the conduct was physically threatening or humiliating.
- The extent to which the conduct unreasonably interfered with an employee's work performance.

Exercise 5

Mac is a unit supervisor for the Board.

Scully, an office technician, sits in a row of five open workstations right outside Mac's office.

On her first day, Mac gives Wanda another office technician, a lingering hug and kisses her on the lips. He says, while looking her up and down, "welcome to Mac's World. If you remember just one rule: what Mac wants, Mac gets, you have a bright future here." To avoid the contact Wanda comes in early to be sure she is seated before Mac gets in but Mac starts rubbing Wanda's shoulders and tells her, you can't stay seated forever, honey. Scully sees and hears these interactions.

Wanda tells Scully what is happening and Scully tells her, "just get over it." Scully starts losing sleep and she misses work because of Mac's mistreatment of Wanda.

Exercise 5 Test

Choose the Best Answer:

- A. Scully cannot state a claim for hostile work environment because she told Wanda not to complain.
- B. Scully has personally witnessed Mac's harassment of Wanda and, therefore, can sue Mac and the Board for sexual harassment due to a hostile work environment.

Exercise 5: Best Answer

- A. Scully cannot state a claim for hostile work environment because she told Wanda not to complain.
- B. Scully has personally witnessed Mac's harassment of Wanda and, therefore, can sue Mac and the Board for sexual harassment due to a hostile work environment.

Exercise 6

Mac and two OTs Martha and Rachel, are openly in a sexual relationship. He calls them to his office for “special consultations.” Their sexual congress is audible through his door.

Mac gives Martha and Rachel, preferred shifts, bonuses and training denied the others.

Mac allows Martha and Rachel to use Scully, Wanda, and Timothy, another OT, to do their work and run personal errands for them.

Scully, Wanda and Timothy are disgusted but work together to make sure they excel at all assignments.

Exercise 6 Test

Choose the best answer:

- A. Scully and Wanda can successfully maintain a sexual harassment/hostile work environment – widespread sexual favoritism claim against Martha and Rachel but not Mac.
- B. Timothy, who has never been harassed by Mac cannot maintain a successful action for sexual harassment/hostile work environment – widespread sexual favoritism.
- C. Scully, Wanda and Timothy can successfully sue Mac, Martha, Rachel and the Board for sexual harassment/hostile work environment – widespread sexual favoritism.

Exercise 6: Best Answer

- A. Scully and Wanda can successfully maintain a sexual harassment/hostile work environment – widespread sexual favoritism claim against Martha and Rachel but not Mac.
- B. Timothy, who has never been harassed by Mac cannot maintain a successful action for sexual harassment/hostile work environment – widespread sexual favoritism.
- C. Scully, Wanda and Timothy can successfully sue Mac, Martha, Rachel and the Board for sexual harassment/hostile work environment – widespread sexual favoritism.

Key Concepts

True/False Quiz #4

1. Sexual desire is a key element to any claim for sexual harassment. True/False.
2. An employee can make out a claim for sexual harassment even if the supervisor took no adverse employment action (e.g., termination, failure to hire, demotion), against the employee. True/False.

Answer to T/F Quiz #4

1. Sexual desire is a key element to any claim for sexual harassment. True/False.
2. An employee can make out a claim for sexual harassment even if the supervisor took no adverse employment action (e.g., termination, failure to hire, demotion), against the employee. True/False.

Sexual Harassment Can Occur Between Individuals of the Same Sex

It has been settled law for some time that “same sex” sexual harassment is actionable under the FEHA.

Sexual Desire is NOT Required

Recent legislation clarified existing law by expressly stating that “Sexually harassing conduct need not be motivated by sexual desire.” The legislation, SB 292 (Corbett) was passed to repudiate the contrary decision in *Kelley v. Conco Companies* (2011) 196 Cal.App.4th 191.

Adverse Employment Action NOT Required

- The complainant does not have to show a loss of a tangible economic loss or other adverse employment action.
- The crux of a harassment claim is the assault on the complainant's personal sense of dignity and well-being.

Denials and Defenses

True/False Quiz #5

1. In California, if the employee does not take advantage of the established internal complaint process, the employer has a complete defense to an action for sexual harassment. True/False

Answer True/False Quiz #5

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Denials

The common response to charges of sexual harassment is a denial of the charges.

- “It never happened.”
- “There are no witnesses”
- “Look at how she dresses!”
- “I am a hugger.”
- “Ever hear of a woman scorned? If I don’t say she’s hot, she’s not going to get the job done.”

Exercise 7

Sam, a senior supervisor for the Department calls Maggie into his office. He tells her that if she'd like to avoid a bad review she must perform a sexual act with him. He grabs her and pushes her to the ground.

Maggie manages to escape Sam's grasp and flees.

Jose sees Maggie running out of Sam's office in distress and thinks her blouse may have been partially off.

Katie sees Maggie in the restroom crying and fixing a tear in her blouse. Maggie tells Katie of the attack.

Sam abruptly promotes Maggie.

Katie and Jose tell the EEO Officer what they saw and heard.

Sam denies anything happened.

Maggie files a complaint with the DFEH alleging quid pro quo sexual harassment.

Exercise 7 Test

Choose the best answer:

- A. Sam is a senior executive and no one witnessed the alleged unwelcome conduct so no one will believe Maggie.
- B. Because Maggie was promoted she suffered no damages, so there can be no claim for quid pro quo harassment.
- C. A reasonable investigator would conclude, based on circumstantial evidence and credibility assessments that quid pro quo sexual harassment did occur.

Exercise 7: Best Answer

- A. Sam is a senior executive and no one witnessed the alleged unwelcome conduct so no one will believe Maggie.
- B. Because Maggie was promoted she suffered no damages, so there can be no claim for quid pro quo harassment.
- C. A reasonable investigator would conclude, based on circumstantial evidence and credibility assessments that quid pro quo sexual harassment did occur.

Defense: Lack of Action by the Victim

1. The victim could have avoided part or most of the harm if he/she had taken advantage of employer's procedures for addressing sexual harassment (Avoidable Consequences Doctrine)
2. The amount of harm to the victim could have been less if the employee had taken action (Failure to Mitigate Damages)

Exercise 7-2

ABC Co. provides all employees a handbook that details ABC's "zero tolerance" sexual harassment policy and instructs employees to call ABC's HR Dept. immediately if the employee experiences or witnesses any sexual harassment.

Pat, an ABC supervisor, whispers as he walks past Olive's desk that Olive should "forget" to wear a bra the next day. Olive, shocked, pretends not to have heard him. From then on, Pat whispers a similar comment every time he passes Olive's workspace. Olive does nothing, thinking it is only a matter of time before Pat, who is an incompetent supervisor, is replaced. After six months, Pat is terminated for poor performance, at which point Olive recounts all of Pat's past actions to a senior executive and asks her to make sure the next supervisor is "less disgusting."

Exercise 7-2 Test

Choose the best answer:

- A. Olive cannot sue anyone for sexual harassment because she let six months go by and waited until Pat was fired before she told anyone.
- B. Olive can sue both Pat and ABC, but ABC can try to reduce the amount it must pay by arguing that the harassment would have stopped if Olive called HR after Pat's first comment.
- C. Olive can only bring a claim against Pat. ABC is not liable because Olive chose not to follow the instructions in the employee handbook.

Exercise 7-2 Best Answer

Choose the best answer:

- A. Olive cannot sue anyone for sexual harassment because she let six months go by and waited until Pat was fired before she told anyone.
- B. Olive can sue both Pat and ABC, but ABC can try to reduce the amount it must pay by arguing that the harassment would have stopped if Olive called HR after Pat's first comment.
- C. Olive can only bring a claim against Pat. ABC is not liable because Olive chose not to follow the instructions in the employee handbook.

COMPARING FEDERAL & STATE SEXUAL HARASSMENT LAWS

True False Quiz #6

1. Unpaid interns and volunteers are protected under federal laws against sexual harassment. True/False
2. California law is broader than federal law in providing protection against sexual harassment. True/False

Answer to T/F Quiz #6

1. Unpaid interns and volunteers are protected under federal laws against sexual harassment. True/False
2. California law is broader than federal law in providing protection against sexual harassment. True/False

Fed TITLE VII

- Negligence theory only [Employer not automatically liable]
- Employer not liable if:
Employer exercised reasonable care; and
Employee unreasonably failed to take advantage of opportunities to avoid harm
- 15 employees or more
- No application to independent contractors, volunteers and unpaid interns.

CA FEHA

- Strict liability [Employer automatically liable for harassment by managers and supervisors]
- Employer has no defense if manager or supervisor is harasser
- *All* employers, even those employing one person or sole proprietors
- Includes independent contractors, volunteers and unpaid interns.

Other Types of Harassment

True False Quiz #7

1. California law identifies 17 specific protected bases for employment discrimination, harassment and retaliation. True/False
2. Sex, sexual orientation, gender, gender identity and gender expression are all protected bases under the FEHA. True/False

Answer to T/F Quiz #7

1. California law identifies 17 specific protected bases for employment discrimination, harassment and retaliation. **True**/False
2. Sex, sexual orientation, gender, gender identity and gender expression are all protected bases under the FEHA. **True**/False

Harassment Based on Any of These Characteristics is Illegal

1. Race
2. Color
3. National Origin
4. Sex
5. Sexual Orientation
6. Gender
7. Gender Identity
8. Gender Expression
9. Religious Creed
10. Mental Disability
11. Physical Disability
12. Medical Condition
13. Military/Veteran Status
14. Marital Status
15. Age
16. Genetic Characteristic
17. Ancestry

Exercise 8

Carl has been an SSM I for the Board for 5 years. Carl approaches a manager, Bill, and tells him that Carl identifies as a transgender woman and is beginning the process of transitioning at work. From now on, Carl would like to be called Kay, will be wearing clothing consistent with his identity as a woman, and prefers the use of feminine pronouns.

As the weeks pass, Kay's coworkers become accustomed to her new name and appearance, but some of them inadvertently refer to Kay as "Carl" and use the masculine pronoun "he," especially when telling stories about things that happened before Kay's transition. Usually, the coworkers quickly correct themselves when this happens. Bill, however, pointedly says "good morning, Carl," when he passes Kay's desk, and makes comments like "nice dress, dude."

Kay, embarrassed, says nothing to Bill or anyone else about these comments for months.

Exercise 8 Test

What advice would you give Kay?

- A. Kay should keep her head down and try to focus on work. Not everyone is going to be comfortable with her gender transition and she should expect some negative comments and remarks.
- B. Kay has a claim for discrimination and harassment because of gender identity and gender expression against the Board because of Bill's treatment of her, as well as because of her coworkers' occasional use of the wrong name and pronoun. Those coworkers should be reprimanded and notes placed in their files.
- C. Kay has a claim against Bill and the Board because of Bill's negative comments and purposeful, repeated use of the wrong name and pronouns. Her coworkers' occasional and accidental mistakes do not create a situation of discrimination or harassment.

Exercise 8: Best Answer

- A. Kay should keep her head down and try to focus on work. Not everyone is going to be comfortable with her gender transition and she should expect some negative comments and remarks.
- B. Kay has a claim for discrimination and harassment because of gender identity and gender expression against the Board because of Bill's treatment of her, as well as because of her coworkers' occasional use of the wrong name and pronoun. Those coworkers should be reprimanded and notes placed in their files.
- C. Kay has a claim against Bill and the Board because of Bill's negative comments and purposeful, repeated use of the wrong name and pronouns. Her coworkers' occasional and accidental mistakes do not create a situation of discrimination or harassment.

PREVENTING & RESPONDING TO SEXUAL HARASSMENT

True False Quiz #8

1. The DFEH can seek injunctive relief to compel employers to take all reasonable steps to prevent unlawful discrimination without proving an underlying violation of the FEHA. True/False
2. The employer's duty to take immediate, effective action in response to a claim of sexual harassment only applies where there is a credible report or threat of unwanted physical contact. True/False

Answer to T/F Quiz #8

1. The DFEH can seek injunctive relief to compel employers to take all reasonable steps to prevent unlawful discrimination without proving an underlying violation of the FEHA. True/False
2. The employer's duty to take immediate, effective action in response to a claim of sexual harassment only applies where there is a credible report or threat of unwanted physical contact. True/False

Employers Must Take All Reasonable Steps

It is unlawful for employers to fail to take all reasonable steps to prevent discrimination, harassment and retaliation. [A determination as to whether an employer has complied with Government Code section 12940(k) includes an individualized assessment, depending upon numerous factors sometimes unique to the particular employer including, but not limited to, its workforce size, budget, and nature of its business, as well as upon the facts of a particular case.

Policies & Procedures: Practical Tips

- Try to anticipate developments in the law and develop policies and procedures before you are confronted by an actual situation.
- Discuss in advance how complaints will be dealt with (e.g., separation; administrative leave, etc.).
- Update/Refresh policies and procedures.
- Use a written form.
- Be flexible.
- Be compassionate and responsive.
- Keep people in the loop as much as possible.
- Develop a clear policy regarding how to complain against persons designated as responsible for receiving complaints; provide multiple options, including external resources such as DFEH and EEOC.

Training

1. Provide training as required by the law.
2. Provide training even if it is not required by the law.
 - Implicit bias training
 - Interaction with certain groups
3. Keep training records.
4. Keep materials readily available in multiple formats (e.g., paper, online)

Leadership

Policies and training must be reinforced by leadership. The managers and supervisors must understand that their adherence to the standards of the law and any more stringent internal “zero tolerance” policies is required.

Top management should model desired behavior and provide appropriate support to managers and supervisors on the front lines.

Resources

Internal

1. EEO Office
2. Human Resources
3. Managers & Supervisors
4. Department Counsel

External

1. DFEH
2. EEOC
3. EAP
4. CalHR's Office of Civil Rights

Abusive Workplace Conduct

True False Quiz #9

1. The Fair Employment and Housing Act makes it unlawful to engage in behavior that a reasonable person in the employee's place would find demeaning.
True/False

Answer to T/F Quiz #9

The Fair Employment and Housing Act makes it unlawful to engage in behavior that a reasonable person in the employee's place would find demeaning. True/False

Abusive Conduct

Conduct in the workplace that a reasonable person would find hostile, offensive and unrelated to an employer's legitimate business interests, including:

- repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets
- verbal or physical conduct that a reasonable person would find threatening, intimidating or humiliating
- the gratuitous sabotage or undermining of a person's work performance.

A single act shall not constitute abusive conduct, unless especially severe and egregious.

Exercise 9

Jason is a new employee at the Authority and having difficulty learning the office protocols. He asks his supervisor Ming for assistance. In a loud, sarcastic voice, audible throughout the open work station area, Ming tells Jason: "I've showed you how to do this simple, simple, simply simple three simple step procedure over and over and over. You should have been paying attention. I won't show you again!"

Exercise 9 Test

Choose the best answer:

- A. Jason can sue Ming for abusive conduct.
- B. Jason should have paid better attention earlier.
- C. Ming's actions constitute abusive workplace conduct, and can likely be disciplined for violation of workplace behavior policies.
- D. Ming's conduct exposes the Authority to liability for unlawful discrimination.

Exercise 9: Best Answer

Choose the best answer:

- A. Jason can sue Ming for abusive conduct.
- B. Jason should have paid better attention earlier.
- C. Ming's actions constitute abusive workplace conduct, and can likely be disciplined for violation of workplace behavior policies.
- D. Ming's conduct exposes the Authority to liability for unlawful discrimination.

Exercise 10

Ming writes an email to Jason which reads:

“Jason, are all Irish mutts as stupid as you? What is it about that thick potato head of yours that you can’t understand the most simple, simple, simple instructions?”

Exercise 10 Test

Choose the best answer:

- A. Ming would likely be found personally liable for harassment based on race, ancestry, national origin.
- B. The Authority is strictly liable for the harassment by Ming, its supervisor.
- C. Jason can recover damages from Ming, personally.
- D. All of the above.

Exercise 10: Best Answer

Choose the best answer:

- A. Ming would likely be found personally liable for harassment based on race, ancestry, national origin.
- B. The Authority is strictly liable for the harassment by Ming, its supervisor.
- C. Jason can recover damages from Ming, personally.
- D. All of the above.

No Independent Cause of Action

- Abusive conduct -- “bullying” -- in and of itself is not a violation of the FEHA unless it can be shown to have been substantially motivated by a protected characteristic.
- Possible Ralph Act claim if violence or the threat of violence is involved. If so, DFEH does have jurisdiction to investigate and litigate.
- Possible non-FEHA claims: assault, battery, intentional infliction of emotional distress.

REVIEW

Learning Objectives Revisited

We appreciate your participation and hope that we have provided useful information regarding:

1. The elements of sexual harassment and the remedies available to victims of sexual harassment under California and federal law.
2. Other forms of unlawful discrimination, harassment and retaliation under the FEHA and other statutes enforced by the DFEH.
3. Strategies for preventing and responding to unlawful discrimination, harassment and retaliation.
4. Concerns regarding abusive conduct in the workplace.

True/False Quiz #10

1. An employer is strictly liable for sexual harassment committed by a supervisor or agent. **True/False.**
2. Only employers with 5 or more employees are liable for sexual harassment under the FEHA. **True/False.**
3. Sexual desire is a required element of a sexual harassment claim. **True/False.**

True/False Quiz #10

1. An employer is strictly liable for sexual harassment committed by a supervisor or agent. **True/False.**
2. Only employers with 5 or more employees are liable for sexual harassment under the FEHA. **True/False.**
3. Sexual desire is a required element of a sexual harassment claim. **True/False.**

QUESTIONS/DISCUSSION

Laws are promises and the promises reflected in the FEHA and other civil rights laws are among the most important we make to each other.

-- Kevin Kish

Thank You for your participation

